SEP 23 1972
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 339

LAMB ENTERPRISES, INC.,
Petitioner,
vs.
THE TOLEDO BLADE COMPANY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT THE OHIO BELL TELEPHONE COMPANY

THOMAS P. MULLIGAN
ROBERT J. HOERNER
1750 Union Commerce Building
Cleveland, Ohio 44115

DEAN G. OSTRUM
100 Erieview Plaza
Cleveland, Ohio 44114

Counsel for Respondent
The Ohio Bell Telephone Company

THE BYRD LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 339

LAMB ENTERPRISES, INC.,
Petitioner,

vs.

THE TOLEDO BLADE COMPANY, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT THE OHIO BELL TELEPHONE COMPANY

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported in 461 F.2d 506.

COUNTERSTATEMENT OF THE CASE

The evidence before the trial court, which must be construed favorably to defendants in view of the jury verdict in their favor, establishes facts which may be briefly summarized as follows:

Respondent The Ohio Bell Telephone Company ("Ohio Bell") is a public utility regulated by the Public Utilities Commission of Ohio. On April 10, 1965 its Tariff was approved authorizing it to provide the service of transmitting CATV signals upon the order of any customer. Paragraph A.1.e. of its Tariff provided:

> "The customer shall comply with applicable laws and ordinances and shall obtain any franchises and permits required by law or ordinance."

Both Petitioner Lamb and Respondent Buckeye Cablevision, Inc., a corporation owned by Respondents The Toledo Blade Company and Cox Broadcasting Company, expressed interest in ordering this service in several cities, including Toledo, Ohio. On July 8, 1965, Buckeye ordered service in virtually all of Toledo, representing some 750 cable miles, and gave to Ohio Bell its check for $111,188 representing payment of one-tenth of the non-recurring charges for the area ordered. After initially expressing an interest in all of Toledo, Lamb changed its plans and on July 17, 1965 ordered service in only a small area of Toledo, comprising a total of 30 cable miles, and mailed to Ohio Bell its check for $44,975 to cover the entire non-recurring charges with respect thereto.

At about the time of these orders there was great interest being expressed in CATV both nation-wide and in the Ohio Bell service area. Accordingly prudence forced Ohio Bell to reach a policy decision as to priority between its two orders respecting Toledo in the event such interest matured into firm orders which resulted in shortages of

either material or manpower. Its decision was, first, that it would build for and serve both customers simultaneously if it could, but secondly, that during the period of any shortage of labor or material, and only during such period, it would build Lamb's entire 30 mile area first (since Lamb's letter of intent of April 12 preceded Buckeye's similar letter of April 20) and only then proceed with Buckeye's 750 cable mile area which, however, it would complete before building any subsequent order which Lamb might enter, if any.

Pursuant to this determination it proceeded to do engineering for both parties, completing the engineering for Lamb on or about November 10, 1965 which was well before it completed engineering even on Buckeye's first one-tenth segment. Engineering for Lamb involved transfer of personnel from Dayton to Toledo, expenditure of over 1,000 man-hours of effort and creation of some 100 detailed blueprints of various sorts. Approval of this engineering was necessary before Ohio Bell could begin construction for Lamb, but Lamb refused to attend a scheduled November 10, 1965 meeting at which it was to approve these engineering blueprints. Lamb never thereafter expressed any interest in going forward with construction in the area ordered or any other area.

On November 29, 1965 the City Council of the City of Toledo passed an ordinance which required that a permit be obtained from the City prior to the time any company could engage in the CATV business in Toledo. Violation of the ordinance was punishable by fine and imprisonment. Lamb never obtained the required permit. Ohio Bell could not have put Lamb into business before November 29, so the cause of its failure to be in business, in addition to its decision on or before November 10 not to proceed, was its failure to obtain the required permit and Ohio Bell's required compliance with paragraph A.1.e.

of its Tariff. Subsequent to any time period relevant in this litigation, paragraph A.1.e. of Ohio Bell's tariff was deleted, and the ordinance in question was found unconstitutional by the Sixth Circuit, *Lamb Enterprises, Inc. v. City of Toledo*, 437 F.2d 59 (6th Cir. 1971).

After a trial exceeding five weeks in length in Lamb's antitrust suit against Ohio Bell, Buckeye, Toledo Blade and Cox, the trial court presented a form of special verdict to the jury, requesting it to answer the written questions contained therein which covered the issues in the case. The jury found for all defendants on all issues in answering these questions and the Court entered judgment accordingly. The Sixth Circuit unanimously affirmed.

ARGUMENT

1. The first question sought to be presented by Petitioner is hypothetical and is not raised by the record in light of the jury verdict.

Petitioner seeks to have this Court grant its petition for a writ of *certiorari* with respect to the question of the effect of an alleged conspiracy to exclude a competitor, which would assertedly otherwise be a *per se* violation of the antitrust laws, in a natural monopoly situation. Petitioner argues that in that posture it was entitled to a directed verdict of liability "as a matter of law." The question as framed by Petitioner does not exist in this case in light of the jury verdict that there was no conspiracy "the purpose of which was to foreclose, prevent, or preclude plaintiffs Lamb . . . " (Petition, p. 6). The Court of Appeals expressly found (Appendix to the Petition, hereinafter "Pet. App.", p. 12):

> "We find substantial evidence in support of the jury's finding that there was not a conspiracy the purpose of

> which was to prevent Lamb from entering the CATV business in Toledo."

The determination by the Court of Appeals that the jury's special verdict enjoyed ample record support cannot be disturbed, nor the question allegedly presented by petitioner reached, with out a *de novo* review of all of the evidence supporting the jury's verdict on that point—a function which is not appropriate to this Court and which, in any event, Petitioner does not ask this Court to perform.

Petitioner's first question is doubly hypothetical as to Ohio Bell, for the Sixth Circuit evaluated the evidence in this case as follows (Pet. App. 14):

> "There was not a scintilla of evidence connecting Bell with any conspiracy."

It accordingly held (Pet. App. 29):

> "In our opinion, Bell was entitled to a directed verdict as there was no evidence connecting it with any conspiracy to exclude Lamb from the CATV business in Toledo."

Unless that conclusion is overturned by this Court following a reevaluation of all of the evidence, and Petitioner makes no such request, the judgment for Ohio Bell could not be disturbed, regardless of this Court's answer to the first question sought to be presented. The Sixth Circuit's ruling (Pet. App. 10-11) that Ohio Bell could not be held for antitrust damages when it had complied with its Tariff, citing *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 453 (1945), provides a further adequate, independent ground upholding the judgment for Ohio Bell.

2. Petitioner's second question concerns only a routine evidentiary ruling, of no general importance.

Petitioner raises as his second question the refusal of the trial court to admit into evidence its Exhibit 43. The letter comprising this exhibit showed consideration by attorneys for the other defendants of approaching the Toledo City Council for an exclusionary ordinance and so was not admissible under the *Noerr-Pennington* rule, as the Sixth Circuit found (Pet. App. 18). Petitioner relies on an exception in footnote 3 in *Pennington,* 381 U.S. 657 at 670, to the effect that evidence showing lobbying activity may nevertheless be admitted to show the purpose and character of other transactions if the trial judge deems "it probative and not unduly prejudicial". Here the trial judge considered that exception and expressly ruled (Pet. App. 19):

> "Well, my ruling is at this point in time that I am going to sustain the objection, because I think at this point in time it would be highly prejudicial."

Accordingly, the ruling represents only the exercise of a trial judge's traditional discretion, unanimously affirmed by an appellate court, in ruling on an evidentiary question pursuant to precisely the standard which this Court has said should govern on such a question.

In any event, this question, also, is purely hypothetical insofar as Ohio Bell is concerned, since the letter was between other parties (Petition, p. 13) and there was no evidence of any sort connecting the letter to Ohio Bell.

CONCLUSION

Insofar as respondent Ohio Bell is concerned, the judgment below rests on adequate and independent grounds, and the questions sought to be raised are purely hypothetical. In any event, the first question is not presented by the record and neither question is of general importance. The petition for a writ of certiorari should be denied.

Respectfully submitted,

THOMAS P. MULLIGAN
ROBERT J. HOERNER
1750 Union Commerce Building
Cleveland, Ohio 44115

DEAN G. OSTRUM
100 Erieview Plaza
Cleveland, Ohio 44114

Attorneys for Respondent
The Ohio Bell Telephone Company